Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,
v.
ESTATE OF TOMMY SMITH, *et. al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

This Court's ruling in *State Farm Mut. Auto. Ins. Co. v. Campbell*, No. 01-1289, slip op. (U.S., Apr. 7, 2003), directly addresses several of the questions presented in the petition, and readily demonstrates that the punitive damages award in this case violates due process. At a minimum, the Court should grant certiorari, vacate the judgment, and remand the case for reconsideration ("GVR") in light of *State Farm*.

But this case—along with *Ford Motor Co. v. Romo*, No.02-1097 (pet. for cert. pending) and *Clark v. Chrysler Corp.*, 310 F.3d 461 (6th Cir. 2002) (pet. for cert. forthcoming)—squarely presents questions, not implicated in *State Farm*, regarding the application of *BMW*'s reprehensibility guidepost to cases involving activities that, like product design, are enormously beneficial to society but that *also* necessarily create risks of serious injury and death. That three cases raising strikingly similar questions have reached this Court almost at the same time shows the critical, recurring nature of those questions. It also shows that these questions have had ample opportunity to percolate in the lower courts. Plenary review is therefore warranted.

I. GVR IS REQUIRED BECAUSE THIS AWARD CONFLICTS WITH *STATE FARM*'S PROHIBITION AGAINST EXTRATERRITORIAL PUNISHMENT.

Question Two of the petition asks whether the Kentucky Supreme Court erred in affirming the trial court's refusal to instruct the jury that it could not impose punishment for out-of-state sales having no impact in Kentucky. *State Farm* answers: "A jury *must* be instructed * * * that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred," slip op. at 11-12 (emphasis added), and as a "general rule" a jury may not impose punitive damages even for "unlawful" out-of-state conduct, *id.* at 11. The punitive verdict clearly reflects punishment for incidents outside of Kentucky, and thus, just as clearly, is unconstitutional under *State Farm*.

Respondents offer three unpersuasive reasons why extra-territorial punishment did not occur here. First, respondents say that they, unlike the plaintiffs in *State Farm*, made only *de minimis* references to out-of-state conduct. Opp. 6. Not so. Respondents elicited numerous nationwide statistics from Ford's witnesses[1] and relied heavily on those statistics in closing. Tape 15, 16:53:57 ("Mr. Carr has told us here today that there's 6.5 or 7 million of those transmissions, C6 transmissions—and, by the way, we believe there are a lot more transmissions involved with this same Ford design."); *id.* at 16:55:14 ("We won't have to worry about those millions and millions of vehicles already on the road that are backing up and running over people and causing death and destruction"); *id.* at 16:56:28 ("How many of those incidents were reported? More than 23,000 * * * How many people were killed, allegedly? In the hundreds."); *id.* at 17:04:17 ("Why didn't Ford Motor Company go back and do something on those 6.5 or 7 million trucks and cars and Lincolns and so forth that have this transmission? * * * [S]end a message to Ford Motor Company, and if other companies are doing it, to them also. The message will be: If you put a dangerous product on the highways, you're going to pay for it."). This case may not involve "days of testimony" concerning out-of-state conduct, Opp. 7, but the jury heard, and was urged to punish, on the basis of such testimony; that it fills fewer record pages here than in *State Farm* does not render reliance on it for forbidden purposes any less problematic.

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[1] While the nationwide statistics upon which respondents relied came from Ford witnesses, most of the testimony was elicited by respondents on cross-examination over Ford's constitutional objections. Tape 14, 15:40:12-15:41:08. The only time Ford elicited such testimony, *see* Opp. RA-4, it showed that, as of 1972, Ford was aware of only 42 reports of mis-shifts out of "several million" vehicles. *Id.*; Tape 11, 15:11:45. That evidence was simply offered to show that Ford investigated *all* 42 of the reports to determine the possible causes of mis-shifts. *Id.* at 15:12:54. As discussed *infra*, Ford is not challenging the admissibility of the statistics, some of which were relevant to issues other than punishment.

Second, respondents insist that the jury here relied on evidence of out-of-state conduct, not to punish, but only to assess Ford's "reprehensibility." Opp. 8-9. Yet this distinction is, at best, a "subtle one that is not easily appreciated by a lay jury," Pet. 17, which is exactly why the jury "must" be instructed concerning extraterritorial conduct, *State Farm*, slip op. at 11. Nowhere is the need for an instruction more evident than in cases involving standardized products, which almost invariably move through the stream of nationwide commerce. Pet. 20-21. Punishment for nationwide product sales very much "creates the possibility of multiple punitive damages awards for the same conduct." *State Farm*, slip op. at 12. In any event, respondents' characterization of their use of the out-of-state evidence at trial is decidedly incomplete. All within the span of only a few minutes, the jury was told to "send a message" to "Ford" and "other companies" about all the "millions and millions" of vehicles on the road and all the nationwide "incidents" and "deaths" Ford had supposedly caused. That is exactly what *State Farm* proscribes.

Third, respondents invoke the "invited error" doctrine, arguing that Ford put extraterritorial conduct into issue when it sought to introduce evidence concerning NHTSA's investigation and decision not to order any safety-related recall. Opp. 11. Ford put NHTSA's actions into evidence, however, for the unquestionably relevant purpose of showing that it had not acted with "malice," and thus could not be punished, under Kentucky law. It was respondents—not Ford—who insisted that they should be allowed to explore the full extent of the extraterritorial sales and incidents NHTSA examined. But the question of who opened the door to the evidence of extraterritorial conduct is beside the point in any event. The issue is not whether that evidence should have been admitted; it is whether the jury should have been allowed to punish Ford for its extraterritorial conduct based on that evidence. By allowing respondents to *use* evidence of out-of-state conduct to urge *punishment*, and by refusing to give the instruction Ford requested—and that *State Farm* requires—the court

allowed the jury to punish Ford for allowing supposedly unsafe vehicles to remain on the roads of other States.[2]

II. GVR IS REQUIRED BECAUSE THE JURY INSTRUCTIONS DID NOT CONSTRAIN THE JURY'S DISCRETION TO PUNISH FORD.

The court below held that adherence to Kentucky's tradition of bare bones instructions satisfied due process. GVR is warranted in light of *State Farm*'s reaffirmation that "[v]ague instructions" facilitate excessive punishment. Slip op. at 11.

Respondents concede that due process requires that the jury's discretion be "exercised within reasonable constraints." Opp. 12 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991)). They contend, though, that the instructions in this case were sufficiently "detailed and tightly drawn." *Id.* at 13. But "detailed" and "tight" instructions are not the same as those that constrain the jury's discretion. As respondents' comparison between the instructions given here and those upheld in *Haslip* reveals, the instructions here may have contained the same number of words, but they did not include the same (or any) constraints. The "factors" the jury considered were reasons to inflate the award. Not one informed the jury—as did the instructions approved in *Haslip* and required by many courts since—that it could impose damages only for the purpose of punishing and deterring the conduct that injured the plaintiff.

Respondents' further suggestion that the failure to provide such an instruction was harmless because arguments of counsel were an adequate substitute is refuted by this Court's

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[2] Respondents suggest in passing that the trial court's errors "should be regarded as harmless" because the Kentucky Supreme Court "cured" them by conducting *de novo* review of the $20 million award and reducing it to $15 million. Opp. 10. The suggestion is frivolous: the Kentucky Supreme Court did not even address Ford's argument that the jury award was impermissibly based on extraterritorial conduct (although it was properly presented to that court, *see Adams v. Robertson*, 520 U.S. 83, 86 (1997)), much less "cure" the problem Ford was—and is—raising.

precedents, *see* Pet. 12-13, and also by the respondents' actual trial argument. Respondents told the jurors that, under the court's instruction, they could award any amount, even $500 million. *Id.* at 5. Respondents' claim that the selfsame instruction was a constitutionally adequate constraint on the jury's discretion thus rings hollow. And the fact that Kentucky now, by statute, requires the instruction Ford was denied is no basis for ignoring the violation here. Opp. 17.

III. GVR IS REQUIRED BECAUSE *STATE FARM* SHOWS THAT THE COURT BELOW MISAPPLIED TWO OF THE THREE *BMW* GUIDEPOSTS.

The petition addresses the cavalier treatment of the three *BMW* guideposts by the court below. *State Farm*'s explication of two of those guideposts plainly warrants GVR here.

1. Question Three of the petition asks whether the $15 million punitive damages award below—which came on top of a $3 million compensatory damages award—is excessive under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). *State Farm* answers: "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, slip op. at 15.

Respondents labor to justify the 5:1 ratio approved here by citing cases approving double-digit ratios. Opp. 24 n.16. But *State Farm* holds that a $1 million compensatory damage award is "substantial" enough to reduce the permissible ratio to 1:1 at the most. Slip op. at 18. If anything, a lower ratio is required here than in *State Farm*: Not only is the compensatory award three times as high,[3] but the "injury—physical in nature—[is] easy to detect." Pet. 26-27; *cf. State Farm*, slip

[3] Respondents suggest that the compensatory award is not "high" because Ford "never contested the size of that award." Opp. 25. But Ford has contested the size of the compensatory award throughout this appeal. The three dissenters below agreed, finding the $3 million award itself excessive by $2 million and the actual ratio to be 15:1. App. 32a-34a.

op. at 15 ("a higher ratio *might* be necessary where 'the injury is hard to detect'" (quoting *BMW*, 517 U.S. at 582)).

2. *State Farm* also exposes the error in the Kentucky Supreme Court's treatment of the third *BMW* guidepost. The court below flatly refused to analyze this guidepost in terms of the maximum $20,000 fine available in Kentucky (for felonious conduct) or the maximum $800,000 fine available at the time under federal law (for selling an entire nationwide fleet of defective vehicles), instead comparing the award only to jury awards in other cases—in other states no less—and in cases arising years and even decades after Ford made the design for which punishment was imposed. Pet. App. 19a & n.43. Respondents contend that this approach is consistent with *BMW*, Opp. 29, but *State Farm* conclusively refutes that claim, slip op. at 18 (comparing award only to Utah state civil sanction of $10,000 fine for fraud).[4]

IV. PLENARY REVIEW IS WARRANTED BECAUSE THIS CASE, LIKE *ROMO* AND *CLARK*, RAISES CRITICAL, RECURRING ISSUES REGARDING *BMW*'S REPREHENSIBILITY GUIDEPOST.

While *State Farm* clearly requires GVR here, plenary review is also appropriate because this case, like *Romo* and *Clark*, typifies the lower courts' recurring errors in applying the *BMW* reprehensibility guidepost to product liability and

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[4] Ford never argued that comparison to jury verdicts alone could satisfy the third *BMW* guidepost. Rather, *after* reviewing the comparable legislatively defined sanctions, *see* Opp. 28, *citing* Ford Br. at 51, Ford also observed that the punitive award was excessive compared to other Kentucky verdicts. Indeed, at the time of trial, the award was more than double all reported punitive awards approved on appeal in Kentucky combined. Pet. 30. (Ford's calculation did not include a bus accident case in Kentucky that, respondents say, involved "punitive damages of sorts." Opp. 28 n.18. As the journalist respondents cite for this "award" notes, that case was settled "without any finding of fault," let alone a punitive verdict, by a judge acting as a private arbitrator. James S. Kunen, RECKLESS DISREGARD 336 (1994).)

other cases involving activities beneficial to society that *also* necessarily create risks of injury and death.

The Kentucky Supreme Court found Ford's conduct "substantial[ly]" reprehensible *solely* because "Ford knew of the dangerous propensities of the C-6 transmission" but "continued producing and installing them." App. 17a. As the petition explains, that reasoning ignores that (i) consumer products, especially vehicles, inherently pose serious dangers; (ii) mere awareness of the dangers caused by a product does not make the product defective, much less worthy of punishment; and (iii) such "awareness" is most likely to be present in cases in which a manufacturer has made a good-faith attempt to balance competing safety risks, and other legitimate goals, in developing a product. Respondents themselves (like the respondents in *Romo*) unintentionally confirm the need for plenary review by repeating the error of the court below (and the courts in *Romo* and *Clark*): They liken to a "violent crime" Ford's knowing adoption of a product design that could (like virtually *all* product designs) cause injuries, Opp. 25, even though reasonable people could—and did—disagree about whether that risk of harm rendered the design defective.

Setting aside respondents' inflammatory accusations, the uncontroverted evidence shows that this case involves, at most, a genuine dispute over whether there was any alternative design that could significantly reduce the risk of misshifting without creating unacceptable countervailing disadvantages. Respondents confirm as much. They declare, for example, that Ford made "intentional decisions to do nothing for ten years" except to "count the dead * * * and pay off millions" instead of implementing "the design change" Ford's engineers considered in 1972. Opp. 22. But the uncontroverted evidence was that Ford engineers installed and tested an actual prototype transmission that incorporated this 1972 change, and found that it created a false sensation that could lead drivers to think the shift lever was locked in Park

when in fact it was mis-positioned between Park and Reverse, Tape 11, 15:33:21-15:40:03. Ford engineers thus rejected it as "a really bad idea." *Id.* at 15:40:03.

Respondent's simplistic assumption that Ford had no reasonable choice but to adopt "the design change" that it considered in 1972 is belied by the facts that (i) respondents never relied upon Ford's failure to adopt that change as evidence of reprehensibility in the courts below, and (ii) their own expert, Melvin Richardson, did not endorse that design change but proposed his own, completely different (and untested) solution. The evidence also showed there were reasonable grounds to conclude that Richardson's design would increase, not decrease, the risk of harm. Pet. 3. Apparently recognizing this, respondents make no serious attempt to defend Richardson's "solution" except to claim that Ford in 1980 made changes "along the lines" of Richardson's recommendation. But the changes Ford made in 1980 were not the changes Richardson recommended; on the contrary, Richardson testified that, even with those changes, the C-6 was still defective. Tape 13A, 9:50:43, 10:23:32, 14:10:10.

Respondents' inability even to identify the alternative design that was so clearly preferable to Ford's design that Ford had no reasonable choice but to adopt it is an objective indicator that there was—in fact—no such clearly preferable design. Even if the jury reasonably concluded that Richardson's untested concept was the better one, there plainly is a reasonable point of view to the contrary.

Indeed, *every* objective factor shows that this case involves, at most, genuine disputes over whether the C-6 design was defective and whether *any* of the alternative designs suggested at trial would reduce (or increase) the risk of harm. First, the performance of the C-6 transmission was comparable to other transmissions. In fact, Richardson admitted that he believed *every* pre-1980 automatic transmission was defective: "be it Ford, Chrysler or GM." Tape 13A, 14:01:26;

Tape 1, 14:16:52.[5] Respondents argue that, in some jurisdictions, compliance with industry standards does not preclude an award of punitive damages. Opp. 20 n.13. Many courts disagree, of course. Pet. 20 n.7. But respondents cannot reasonably deny—and nowhere address—that a manufacturer's compliance with industry standards is at least *relevant* to reprehensibility. The decision below, like many involving products (including *Romo*), refused to take those standards into account at all.

Moreover, the federal government thoroughly investigated the precise question of whether the "dangers" associated with mis-shifts in automatic transmissions, including C-6 transmissions, warranted a finding that those transmissions contained a safety-related defect. Pet. 6-7. NHTSA declined to find a defect and also determined that a recall would not reduce the number of park-to-reverse incidents, because such mis-shifts occur on all automatic transmissions. Tape 15, 14:58:22-14:59:10.

Indeed, NHTSA considered and rejected the very contentions respondents make in this Court. Respondents suggest that Smith's "death could have been avoided" if Ford had retrofitted Sand Hill's 1977 pickup truck with the "safer design changes" Ford installed in new vehicles in 1980, or if Ford had taken steps to notify owners of the dangers associ-

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[5] Respondents' unqualified claim that C-6 transmissions "experienced more park to reverse incidents than those of [Ford's] competitors," App. 12a (cited in Opp. 20), provides another example of how the facts in complex product liability cases can be manipulated to create an illusion of highly reprehensible conduct, when in fact the conduct is highly salutary. Respondents simply ignore, as if it did not exist, the undisputed evidence that Ford more actively solicited consumer complaints than its competitors, providing a reasonable basis for Ford to conclude that the disproportionate number of reports was not attributable to Ford's design but to its own thorough and conscientious investigation of the issue. Tape 14, 15:51:46-15:52:38. NHTSA made clear that "the alleged safety problem is not unique to Ford vehicles; rather it has been experienced on an industry-wide basis." Ford Ky. Ct. Apps. Br., Tab 9.

ated with mis-shifts. Opp. 26, n.17. But it is undisputed that Ford did send notices to all purchasers of vehicles containing C-6 transmissions of the dangers associated with mis-shifts. NHTSA found that "a recall campaign to mechanically alter a vehicle's transmission" by installing the 1980 design changes "would not reduce park-to-reverse incidents to *any greater degree than had already been accomplished* by [Ford's voluntary] notification warning label campaign." Tape 16, 14:58:22-14:59:10 (emphasis added).

Respondents argue that NHTSA's decision was "more an expression of exhaustion than exoneration." Opp. 20. But NHTSA's "exhaustion" resulted from "the largest and most difficult and complex investigation [it] ever conducted," *Center for Auto Safety, Inc. v. Lewis,* 685 F.2d 656, 663 (D.C. Cir. 1982)—an exhaustive investigation that would plainly not have been necessary if the matter were as free from doubt as respondents suggest. NHTSA refused to reopen its investigation on numerous occasions, and, by the time of trial, the investigation had spanned the course of four Presidencies. The "back-of-the-hand" treatment respondents accord the considered judgment of the federal government (like the same type of treatment accorded federal government conclusions in *Romo* and *Clark*) is directly contrary to *BMW,* where this Court held that the defendant's compliance with government standards provided reasonable grounds for the defendant to conclude its conduct was lawful and, therefore, decreased the defendant's reprehensibility. 517 U.S. at 578.

CONCLUSION

For the reasons stated, the Court should GVR in light of *State Farm* or, alternatively, grant plenary review of the petition.

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